

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

6 In re:) MDL Docket No. 1376
7 ZONOLITE ATTIC INSULATION)
8 PRODUCTS LIABILITY LITIGATION)
9 PAUL PRICE, JOHN PREBIL and) Civil Action No. CV 0071-M-DWM
10 MARGERY PREBIL, on behalf of)
11 themselves and all others similarly situated,) (Transferred from the District of Montana,
12 Plaintiffs,) Missoula Division)
13 v.)
14 W.R. GRACE & COMPANY (a Delaware)
15 corporation); W.R. GRACE & COMPANY-)
16 CONN. (a Connecticut Corporation); W.R.)
GRACE & CO., a/k/a GRACE, an association)
of business entities; SEALED AIR)
CORPORATION (a Delaware corporation),)
17 Defendants.)

DECLARATION OF ATTORNEY RICHARD S. LEWIS

1 City of Washington)
2 District of Columbia) ss.

3 RICHARD S. LEWIS states:

4 1. I am an attorney for the plaintiffs in the above-captioned matter. I have personal
5 knowledge of the facts contained in this Affidavit, and am otherwise competent to testify to those
6 facts.

7 2. The documents designated with "Common Exhibit" numbers are common
8 exhibits used in the personal injury actions against W.R. Grace in scores of cases in the
9 Nineteenth Judicial District Court for the State of Montana (Lincoln County). For each of the
10 following exhibits designated with "Common Exhibit" numbers, W.R. Grace has acknowledged
11 a) authenticity, and b) that they are business records of W.R. Grace & Co.

12 3. The documents listed not designated with "Common Exhibit" numbers are true and
13 correct copies of the documents described.

14 Exhibit 1 is a true and correct copy from *Barbanti v. W.R. Grace, et al.*, (Spokane Co.,
15 Case No. 00201756-6), Order Granting Plaintiff's Motion for Class Certification Pursuant to
16 CR23(b)(2), (December 19, 2000).

17 Exhibit 2 is a true and correct copy from *Barbanti v. W.R. Grace, et al.*, (Spokane Co.,
18 Case No. 00201756-6), Memorandum Decision Motion #1 (November 28, 2000).

19 Exhibit 3 is a true and correct copy from *Barbanti v. W.R. Grace, et al.*, (Spokane Co.,
20 Case No. 00201756-6), Memorandum Opinion Motion No. 2 (December 19, 2000).

21 Exhibit 4 is purposely left blank at this time. Plaintiffs have not yet received a signed
22 copy of the Order Denying Plaintiffs' Motion for Preliminary Injunction and Emergency Notice
23 to Class Members.

24 Exhibit 5 is a true and correct copy from *Barbanti v. W.R. Grace, et al.*, (Spokane Co.,
25 Case No. 00201756-6), Proposed Rule 23 (d)(2) Notice.

26
AFFIDAVIT OF ATTORNEY RICHARD S. LEWIS

ODMA:MHODMANAG,95474 1

4 Exhibit 7 is a true and correct copy of a memo to Bettacchi from Ciampa re Monthly
5 Report of insulation sales (Sept. 83).

6 Exhibit 8 (Common Exhibit 16) is a September 12, 1956 report from Benjamin Wake,
7 acting industrial hygiene engineer for the Montana Department of Environmental Quality, to
8 Dohrman H. Byers, Assistant Chief, Toxicological Section of United States Public Health
9 Service, documenting the asbestos content in the zonolite ore in its relationship to asbestos in the
10 dust in the air pertaining to vermiculite mined at Libby, Montana.

11 Exhibit 9 is a true and correct copy of memo dated 4/19/77 to Wood from Yang regarding
12 tremolite content of Zonolite products.

19 Exhibit 11 is a true and correct copy of information obtained from the U.S. Census
20 Bureau internet site (<http://www.census.gov>) entitled "Expenditures for Residential
21 Improvements and Repairs by Property Type, Quarterly 1962-1998."

1 Exhibit13 is a true and correct copy of information obtained from the U.S. Census Bureau
 2 internet site (<http://www.census.gov>) entitled "Expenditures for Improvements and Repairs of
 3 Residential Properties Second Quarter 1999" with attached Tables showing Expenditures for
 4 Maintenance and Repairs and Improvement for 1988 to 1999.

5 Exhibit 14 (Common Exhibit 17) is a report dated August 8-9, 1956 by the Montana State
 6 Board of Health on the Zonolite operation at Libby, Montana.

7 Exhibit 15 (Common Exhibit 26) is a July 20, 1959 report from Libby physician J.M.
 8 Cairns to the manager of the Libby mine documenting 48 abnormal chest x-rays out of 130
 9 people examined.

10 Exhibit 16 (Common Exhibit 33) is a letter dated June 14, 1961 from Earl Lovick,
 11 manager of the Zonolite mill in Libby, Montana to C.A. Pratt, Vice President of Western Mineral
 12 Products Company documenting Grace's knowledge of the large amount of asbestos dust
 13 generated by vermiculite mined at Libby.

14 Exhibit 17 is a true and correct copy of a 10/6/64 Chicago Daily News article entitled
 15 "Suspect Asbestos a Cancer Source."

16 Exhibit 18 (Common Exhibit 53) is a report with a cover letter dated May 11, 1964 of the
 17 Montana State Board of Health regarding the asbestos problem arising out of Libby's handling of
 18 vermiculite.

19 Exhibit 19 (Common Exhibit 130.4) is a study performed by Grace documenting
 20 incidence of lung disease among Libby workers from 17% of the one to five year service group,
 21 "climbing to 92% in the 21 to 25 year service group." Attached to this Grace document is a color
 22 demonstrative exhibit graphing the data from the exhibit summary.

23 Exhibit 20 (Common Exhibits 119.3 and 122.5) consists of March 1969 memos from
 24 Charles Dugan and Peter Kostic of Grace's Industrial Hygiene Department copied to high-level
 25 Grace executives including Rodney Vining, President of the Construction Products Division and
 26

AFFIDAVIT OF ATTORNEY RICHARD S. LEWIS

ODMA MHDMA IMANAGE, 95474 1

1 R.W. Sterrett, Vice President of the Zonolite operations. Attached is a color demonstrative
2 exhibit.

3 Exhibit 21 (Common Exhibit 182.142) is a March 11, 1976 memo to H.A. Brown,
4 Executive Vice President of the Zonolite Operations, and copied to Henry Eschenbach, Grace's
5 chief industrial hygienist; Rodney Vining, President of the Construction Products Division; J.W.
6 Wolter, Zonolite's vice president in charge of mining and manufacturing; and O.M. Favorito,
7 General Counsel for W.R. Grace, Industrial Chemicals Group. This exhibit documents Grace's
8 knowledge of the excessive fiber levels generated by use of Zonolite attic fill. Attached is a
9 color demonstrative exhibit.

10 Exhibit 22 is a true and correct copy of pages from the 10/23/91 deposition of Robert
11 Junker together with a demonstrative exhibit created therefrom.

12 Exhibit 23 is a true and correct copy of a 11/1/85 Grace memo regarding lung cancer risk
13 assessment (30,000 people).

14 Exhibit 24 is a true and correct copy of "Asbestos in Vermiculite Insulation," US EPA
15 Office of Pollution Prevention and Toxics (December 29, 2000).

16 Exhibit 25 is a true and correct copy of the Affidavit of Henry A. Anderson, M.D., (July
17 20, 2000).

18 Exhibit 26 is a true and correct copy of "Guidance for Controlling Asbestos-Containing
19 Materials in Buildings," U.S. EPA (1985) (known as the "Purple Book").

20 Exhibit 27 is a true and correct copy of "Managing Asbestos in Place," U.S. EPA (1990)
21 (known as the "Green Book").

22 Exhibit 28 is a true and correct copy of the Affidavit of Donald J. Hurst, President of
23 Fulcrum Environmental Consulting (July 19, 2000).

24 Exhibit 29 is a true and correct copy of an October 9, 2000 Region 1 EPA web page,
25 "Q&A Regarding Vermiculite Insulation."

26

AFFIDAVIT OF ATTORNEY RICHARD S. LEWIS

ODMA\HODMA\MANAGE,95474.1

1 Exhibit 30 is a true and correct copy of a September 2000 Region 10 EPA Fact Sheet,
2 "Asbestos in Attic Insulation."

3 Exhibit 31 is a true and correct copy of a June 28, 2000 ATSDR web page, "Questions
4 and Answers, Exposure to Asbestos in Insulation."

5 Exhibit 32 is a true and correct copy of the Affidavit of Richard Hatfield (July 18, 2000).
6 Mr. Hatfield is a certified environmental consultant and the Senior Asbestos Consultant at
7 Materials Analytical Services.

8 Exhibit 33 is a true and correct copy of EPA Report to Congress of *Asbestos-Containing*
9 *Materials in Public Buildings*, February 1988, p. 5.

10 Exhibit 34 is a true and correct copy of OSHA Fed. Reg., Vol. 59, No. 153, August 10,
11 1994, at p. 40978.

12 Exhibit 34.1 is EPA, Asbestos-Containing Materials in Schools, Final Rule and Notice,
13 52 Fed. Reg. 41826 (Oct. 30, 1987).

14 Exhibit 35 (Common Exhibit 183.183) is a July 11, 1976 report of testing of asbestos
15 generation by simulated tests installing Zonolite attic fill conducted out of Grace's expanding
16 plant near Weedsport, New York, which report was copied to Grace's chief industrial hygienist,
17 Henry Eschenbach; Grace Executive Vice President for Zonolite, E.S. Wood; and Grace's
18 President in charge of Construction Products Division, Rodney M. Vining. Attached to Exhibit
19 35 is a color demonstrative exhibit.

20 Exhibit 36 is a true and correct copy of a 4/1/80 letter to Ray from Wood regarding
21 testing and protocols.

22 Exhibit 37 is a true and correct copy of a 3/25/80 memo to McCord from Eaton regarding
23 Consumer Products.

24 Exhibit 38 is a true and correct copy of NIOSH Pamphlet No. 81-103, *Workplace*
25 *Exposure to Asbestos* (November 1980), p. 3.

1 Exhibit 39 is a true and correct copy of EPA Orange Book, Asbestos-Containing Material
2 in School Buildings: A Guidance Document (March 1979), Part I, p. 1.

3 Exhibit 40 is a true and correct copy of the EPA, *Friable Asbestos-Containing Materials*
4 *in Schools; Proposed Identification and Notification*, 45 Fed. Reg. 182, p. 61969 dated 9/17/80.

5 Exhibit 41 is a true and correct copy of EPA Blue Book, *Guidance for Controlling*
6 *Friable Asbestos-Containing Materials in Buildings* (March 1983), p. 1-1.

7 Exhibit 42 is a true and correct copy of *EPA Airborne Asbestos Health Assessment*
8 *Update* (June 1986), p. 72.

9 Exhibit 43 (Common Exhibit 10c) is an early Zonolite brochure documenting the public
10 representations concerning the safety of Zonolite attic insulation. Attached is color
11 demonstrative including a photograph of the front of a bag of Zonolite attic insulation.

12 Exhibit 44 (Common Exhibit 31.6 and 11) are advertisements used to market Zonolite
13 vermiculite insulation in November of 1960, and a Zonolite brochure used beginning 1950 to
14 describe how to use Zonolite attic insulation. Attached to Exhibit 44 is a demonstrative exhibit.

15 Exhibit 45 is a true and correct copy of the Affidavit of homeowner John Holbrook (July
16 21, 2000).

17 Exhibit 46 is a true and correct copy of the Affidavit of homeowner Randy Hatch (July
18 20, 2000).

19 Exhibit 47 is a true and correct copy of the Affidavit of homeowner Ralph Busch (July
20 20, 2000).

21 Exhibit 48 is a true and correct copy of the Affidavit of homeowner Brendan King (July
22 19, 2000).

23 Exhibit 49 is a true and correct copy of Washington State Survey Summary Report
24 (October 2000).

25
26

AFFIDAVIT OF ATTORNEY RICHARD S. LEWIS

ODMA\MIODMA\IMANAGE.95474.1

1 Exhibit 50 is an excerpt (pages 2-6) of an EPA Action Memorandum (May 23, 2000)
2 which was attached as Attachment 1 to EPA Unilateral Administrative Order for Removal
3 Response Activities (May 24, 2000).

4

5 FURTHER THE AFFIANT SAYETH NOT.

6 
7 Richard S. Lewis

8 SUBSCRIBED AND SWORN to before me this 19 day of January, 2001.
9

10 (SEAL)

11 
12 Notary Public for the District of Columbia
13 My Commission expires: 5/31/2001

EXHIBIT 1

1
2
3
4
5
6
7
RECEIVED2
3
4
5
6
7
DEC 22 20008
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
559
560
561
562
563
564
565
566
567
568
569
569
570
571
572
573
574
575
576
577
578
579
579
580
581
582
583
584
585
586
587
588
589
589
590
591
592
593
594
595
596
597
598
599
599
600
601
602
603
604
605
606
607
608
609
609
610
611
612
613
614
615
616
617
618
619
619
620
621
622
623
624
625
626
627
628
629
629
630
631
632
633
634
635
636
637
638
639
639
640
641
642
643
644
645
646
647
648
649
649
650
651
652
653
654
655
656
657
658
659
659
660
661
662
663
664
665
666
667
668
669
669
670
671
672
673
674
675
676
677
678
679
679
680
681
682
683
684
685
686
687
688
689
689
690
691
692
693
694
695
696
697
698
699
699
700
701
702
703
704
705
706
707
708
709
709
710
711
712
713
714
715
716
717
718
719
719
720
721
722
723
724
725
726
727
728
729
729
730
731
732
733
734
735
736
737
738
739
739
740
741
742
743
744
745
746
747
748
749
749
750
751
752
753
754
755
756
757
758
759
759
760
761
762
763
764
765
766
767
768
769
769
770
771
772
773
774
775
776
777
778
779
779
780
781
782
783
784
785
786
787
788
789
789
790
791
792
793
794
795
796
797
798
799
799
800
801
802
803
804
805
806
807
808
809
809
810
811
812
813
814
815
816
817
818
819
819
820
821
822
823
824
825
826
827
828
829
829
830
831
832
833
834
835
836
837
838
839
839
840
841
842
843
844
845
846
847
848
849
849
850
851
852
853
854
855
856
857
858
859
859
860
861
862
863
864
865
866
867
868
869
869
870
871
872
873
874
875
876
877
878
879
879
880
881
882
883
884
885
886
887
888
889
889
890
891
892
893
894
895
896
897
898
899
899
900
901
902
903
904
905
906
907
908
909
909
910
911
912
913
914
915
916
917
918
919
919
920
921
922
923
924
925
926
927
928
929
929
930
931
932
933
934
935
936
937
938
939
939
940
941
942
943
944
945
946
947
948
949
949
950
951
952
953
954
955
956
957
958
959
959
960
961
962
963
964
965
966
967
968
969
969
970
971
972
973
974
975
976
977
978
979
979
980
981
982
983
984
985
986
987
988
989
989
990
991
992
993
994
995
996
997
998
999
1000
1001
1002
1003
1004
1005
1006
1007
1008
1009
1009
1010
1011
1012
1013
1014
1015
1016
1017
1018
1019
1019
1020
1021
1022
1023
1024
1025
1026
1027
1028
1029
1029
1030
1031
1032
1033
1034
1035
1036
1037
1038
1039
1039
1040
1041
1042
1043
1044
1045
1046
1047
1048
1049
1049
1050
1051
1052
1053
1054
1055
1056
1057
1058
1059
1059
1060
1061
1062
1063
1064
1065
1066
1067
1068
1069
1069
1070
1071
1072
1073
1074
1075
1076
1077
1078
1079
1079
1080
1081
1082
1083
1084
1085
1086
1087
1088
1089
1089
1090
1091
1092
1093
1094
1095
1096
1097
1098
1099
1099
1100
1101
1102
1103
1104
1105
1106
1107
1108
1109
1109
1110
1111
1112
1113
1114
1115
1116
1117
1118
1119
1119
1120
1121
1122
1123
1124
1125
1126
1127
1128
1129
1129
1130
1131
1132
1133
1134
1135
1136
1137
1138
1139
1139
1140
1141
1142
1143
1144
1145
1146
1147
1148
1149
1149
1150
1151
1152
1153
1154
1155
1156
1157
1158
1159
1159
1160
1161
1162
1163
1164
1165
1166
1167
1168
1169
1169
1170
1171
1172
1173
1174
1175
1176
1177
1178
1179
1179
1180
1181
1182
1183
1184
1185
1186
1187
1188
1189
1189
1190
1191
1192
1193
1194
1195
1196
1197
1198
1199
1199
1200
1201
1202
1203
1204
1205
1206
1207
1208
1209
1209
1210
1211
1212
1213
1214
1215
1216
1217
1218
1219
1219
1220
1221
1222
1223
1224
1225
1226
1227
1228
1229
1229
1230
1231
1232
1233
1234
1235
1236
1237
1238
1239
1239
1240
1241
1242
1243
1244
1245
1246
1247
1248
1249
1249
1250
1251
1252
1253
1254
1255
1256
1257
1258
1259
1259
1260
1261
1262
1263
1264
1265
1266
1267
1268
1269
1269
1270
1271
1272
1273
1274
1275
1276
1277
1278
1279
1279
1280
1281
1282
1283
1284
1285
1286
1287
1288
1289
1289
1290
1291
1292
1293
1294
1295
1296
1297
1298
1299
1299
1300
1301
1302
1303
1304
1305
1306
1307
1308
1309
1309
1310
1311
1312
1313
1314
1315
1316
1317
1318
1319
1319
1320
1321
1322
1323
1324
1325
1326
1327
1328
1329
1329
1330
1331
1332
1333
1334
1335
1336
1337
1338
1339
1339
1340
1341
1342
1343
1344
1345
1346
1347
1348
1349
1349
1350
1351
1352
1353
1354
1355
1356
1357
1358
1359
1359
1360
1361
1362
1363
1364
1365
1366
1367
1368
1369
1369
1370
1371
1372
1373
1374
1375
1376
1377
1378
1379
1379
1380
1381
1382
1383
1384
1385
1386
1387
1388
1389
1389
1390
1391
1392
1393
1394
1395
1396
1397
1398
1399
1399
1400
1401
1402
1403
1404
1405
1406
1407
1408
1409
1409
1410
1411
1412
1413
1414
1415
1416
1417
1418
1419
1419
1420
1421
1422
1423
1424
1425
1426
1427
1428
1429
1429
1430
1431
1432
1433
1434
1435
1436
1437
1438
1439
1439
1440
1441
1442
1443
1444
1445
1446
1447
1448
1449
1449
1450
1451
1452
1453
1454
1455
1456
1457
1458
1459
1459
1460
1461
1462
1463
1464
1465
1466
1467
1468
1469
1469
1470
1471
1472
1473
1474
1475
1476
1477
1478
1479
1479
1480
1481
1482
1483
1484
1485
1486
1487
1488
1489
1489
1490
1491
1492
1493
1494
1495
1496
1497
1498
1499
1499
1500
1501
1502
1503
1504
1505
1506
1507
1508
1509
1509
1510
1511
1512
1513
1514
1515
1516
1517
1518
1519
1519
1520
1521
1522
1523
1524
1525
1526
1527
1528
1529
1529
1530
1531
1532
1533
1534
1535
1536
1537
1538
1539
1539
1540
1541
1542
1543
1544
1545
1546
1547
1548
1549
1549
1550
1551
1552
1553
1554
1555
1556
1557
1558
1559
1559
1560
1561
1562
1563
1564
1565
1566
1567
1568
1569
1569
1570
1571
1572
1573
1574
1575
1576
1577
1578
1579
1579
1580
1581
1582
1583
1584
1585
1586
1587
1588
1589
1589
1590
1591
1592
1593
1594
1595
1596
1597
1598
1599
1599
1600
1601
1602
1603
1604
1605
1606
1607
1608
1609
1609
1610
1611
1612
1613
1614
1615
1616
1617
1618
1619
1619
1620
1621
1622
1623
1624
1625
1626
1627
1628
1629
1629
1630
1631
1632
1633
1634
1635
1636
1637
1638
1639
1639
1640
1641
1642
1643
1644
1645
1646
1647
1648
1649
1649
1650
1651
1652
1653
1654
1655
1656
1657
1658
1659
1659
1660
1661
1662
1663
1664
1665
1666
1667
1668
1669
1669
1670
1671
1672
1673
1674
1675
1676
1677
1678
1679
1679
1680
1681
1682
1683
1684
1685
1686
1687
1688
1689
1689
1690
1691
1692
1693
1694
1695
1696
1697
1698
1699
1699
1700
1701
1702
1703
1704
1705
1706
1707
1708
1709
1709
1710
1711
1712
1713
1714
1715
1716
1717
1718
1719
1719
1720
1721
1722
1723
1724
1725
1726
1727
1728
1729
1729
1730
1731
1732
1733
1734
1735
1736
1737
1738
1739
1739
1740
1741
1742
1743
1744
1745
1746
1747
1748
1749
1749
1750
1751
1752
1753
1754
1755
1756
1757
1758
1759
1759
1760
1761
1762
1763
1764
1765
1766
1767
1768
1769
1769
1770
1771
1772
1773
1774
1775
1776
1777
1778
1779
1779
1780
1781
1782
1783
1784
1785
1786
1787
1788
1789
1789
1790
1791
1792
1793
1794
1795
1796
1797
1798
1799
1799
1800
1801
1802
1803
1804
1805
1806
1807
1808
1809
1809
1810
1811
1812
1813
1814
1815
1816
1817
1818
1819
1819
1820
1821
1822
1823
1824
1825
1826
1827
1828
1829
1829
1830
1831
1832
1833
1834
1835
1836
1837
1838
1839
1839
1840
1841
1842
1843
1844
1845
1846
1847
1848
1849
1849
1850
1851
1852
1853
1854
1855
1856
1857
1858
1859
1859
1860
1861
1862
1863
1864
1865
1866
1867
1868
1869
1869
1870
1871
1872
1873
1874
1875
1876
1877
1878
1879
1879
1880
1881
1882
1883
1884
1885
1886
1887
1888
1889
1889
1890
1891
1892
1893
1894
1895
1896
1897
1898
1899
1899
1900
1901
1902
1903
1904

1 Decision is attached to this Order and fully incorporated herein by reference. In particular, the
2 Court expressly finds:

- 3 1). That the numerosity requirement has been met based on the evidence presented;
- 4 2). That named plaintiff's claims present questions of law and fact common to the class;
- 5 3). That the claims of the above-named plaintiff are typical of the claims of the class he
seeks to represent;
- 6 4). That named plaintiff and his counsel can fairly and adequately represent the interests of
the class; and
- 7 5). That the action brought by plaintiff is equitable in character and is properly certified
under Civil Rule 23(b)(2).

10 3. ORDER

11 THEREFORE, IT IS HEREBY ORDERED that Plaintiffs' Motion is Granted and that this
12 action may be maintained as a class action pursuant to CR 23 and its subdivision CR 23(b)(2) with
13 respect to the claims asserted in the Class Action Complaint against W. R. Grace & Company-
14 Conn., W. R. Grace & Company, W. R. Grace & Co., a/k/a Grace, an association of business
15 entities, Sealed Air Corporation, and William V. Culver. (The Court has not made a finding as to
16 the existence or non-existence of the entity sued as "W.R. Grace & Co a/k/a Grace, an association
of business entities").

17 The Class shall be composed of and defined as: All owners or occupiers of real property
18 located in the state of Washington in which Zonolite Attic Insulation has been installed.

19 DONE IN OPEN COURT this 17th day of December, 2000.

20 21 KATHLEEN M. O'CONNOR

22 23 24 25 26 KATHLEEN M. O'CONNOR
JUDGE

ORDER GRANTING PLAINTIFF'S MOTION FOR CLASS
CERTIFICATION PURSUANT TO CR 23(b)(2): 2
(Motion No. 1)

1 Presented by:
2 LUKINS & ANNIS, P.S.

3 
4 By: Darrell W. Scott
5 DARRELL W. SCOTT, WSBA #20241
6 Attorneys for Plaintiff

7 Approved as to Form and Notice
Of Presentment Waived:

8 PERKINS, COIE, LLP

9
10 By: Approved telephonically by V.L. Woolston 12/19/00
11 V. L. Woolston, Jr., WSBA #9453
12 Rocco N. Trappiedi, WSBA #9137
13 Attorneys for Defendants Grace

14 PAIN, HAMBLEN, COFFIN, BROOKE & MILLER

15
16 By: Approved telephonically by David Broom 12/19/00
17 Donald G. Stone, WSBA #7547
18 David L. Broom, WSBA #02096
19 Attorneys for Defendants Sealed Air Corporation

20
21
22
23
24
25
26 ORDER GRANTING PLAINTIFF'S MOTION FOR CLASS
CERTIFICATION PURSUANT TO CR 23(b)(2): 3
(Motion No. 1)

1 VNTCLTEN DWSLBYIWA ZONOLITE INSULATION MFG. LINGS ORDER CLASS CERT DOC 1381

LAW OFFICES
LUKINS & ANNIS
A PROFESSIONAL SERVICE CORPORATION
1111 W SPRUCE AVE
SPOLANE WA 99204
(509) 345-4433

EXHIBIT 2

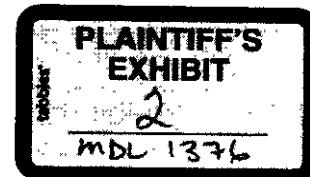
1 SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE
2

3 MARCO BARBANTI, ETAL,)
4 Plaintiff,) Case No.: No. 00-2-01756-6
5 vs.)
6 W. R. GRACE & CO. ETAL,) MEMORANDUM DECISION (MOTION #1)
7 Defendant)
8

9 This matter came before the court for oral argument on September 21, 2000, on
10 Plaintiffs' Motion for Class Certification Pursuant to CR 23(b)(2). The following pleadings were
11 considered by the court:

12 1. Plaintiffs' Motion for Class Certification Pursuant to CR 23(b)(2)
13 2. Brief in Support of Class Certification
14 3. Declaration of Kristy L. Bergland
15 4. Declaration of Richard S. Lewis
16 5. Declaration of Allan M. McGarvey
17 6. Affidavit of Darrell W. Scott
18 7. Declaration of Fabrice Vincent
19 8. Declaration of Edward J. Westbrook
20 9. Plaintiffs' Supplemental Submission in Support of Class Certification
21 10. Declaration of Fabrice N. Vincent and attachments thereto
22 11. Grace Defendants' Brief in Opposition to Plaintiffs' Motion for Class Certification Pursuant
23 to CR 23(b)(2) and 23(b)(3)
24 12. Declaration of Rocco N. Treppiedi and attachments thereto
25

MEMORANDUM DECISION (MOT. #1): 1



- 1 13. Affidavit of Donald J. Hurst (submitted by Plaintiffs in support of the application for
- 2 Preliminary Injunction and submitted by Defendants' in support of their opposition to
- 3 Plaintiff's Class Certification motion) and attachments thereto
- 4 14. Defendant Sealed Air Corporation's Joinder in Grace's Argument and Brief in Opposition to
- 5 Plaintiffs' Motion for Class Certification Pursuant to CR 23(b)(2) and 23(b)(3)
- 6 15. Plaintiffs' Reply in Support of Motion for Class Certification.

7

8 **STATEMENT OF FACTS**

9 Plaintiff Barbanti brings this action on behalf of a purported class of all owners and
10 occupiers of real property located in the State of Washington in which Zonolite Attic Insulation
11 has been installed. Defendants' are alleged to be the manufacturers of this product. The claims
12 asserted include product liability claims under the Washington Products Liability Act (WPLA),
13 RCW 7.72 and violations of the Consumer Protection Act (CPA), RCW 19.86.

14 Plaintiffs' are seeking injunctive relief as well as compensation for property damage
15 suffered by class members. Plaintiffs are not seeking compensatory damages for any illness a
16 class member may have contracted as a result of exposure to Zonolite Attic Insulation nor are
17 they seeking to establish a medical-monitoring regime.

18

19 **DISCUSSION**

20 In Washington the process of class certification is governed Civil Rule CR 23. At the
21 outset the plaintiffs must demonstrate that they meet the four requirements of CR 23(a):

22 One or more members of a class may sue or be sued as representative
23 parties on behalf of all only if (1) the class is so numerous that joinder
24 of all members is impractical; (2) there are questions of law or fact
25 common to the class; (3) the claims or defenses of the representative

MEMORANDUM DECISION (MOT. #1): 2

1 parties are typical of the claims or defenses of the class, and (4) the
2 representative parties will fairly and adequately protect the interests
3 of the class.

4 Subsection one is known as " numerosity ". The only evidence presented with respect to
5 this section was plaintiffs' reference to a 1985 EPA publication which estimated Zonolite was
6 installed in 900,000 homes between 1974 and 1984. From that number plaintiffs' estimate at
7 least 18,800 Washington homes may contain this insulation. Plaintiffs' argue this is a
8 conservative number as this product was on the market for many years. The defendants' did not
9 challenge this number. The numerosity requirement has been met.

10 Subsection two is known as " commonality " and requires evidence questions of law or
11 fact common to the class. Plaintiffs' focus on a common course of conduct by the defendants
12 towards all potential class members i.e., a pattern of alleged misrepresentations in advertising the
13 product, failure to warn, etc. as meeting this requirement.

14 Also, plaintiffs' seek equitable relief for the class as a whole in the areas of warnings,
15 education, and remediation, not individual relief. Plaintiffs' do acknowledge in their
16 supplemental brief that there may be some potential class members who are already aware of the
17 alleged problems with Zonolite Attic Insulation and have expended money to remove the
18 insulation. The injunctive relief suggested by the plaintiffs would include a defendant-funded
19 remediation program where, presumably, class members would apply for funds to remove the
20 insulation.

21 However, plaintiffs assert the fact there may be some compensation for remediation does
22 not detract from the nexus of common facts particularly with respect to the liability issues, I
23 agree. The issue of monetary damages is more properly considered in connection with the
24 analysis of whether CR 23(b)(1) or (2) or CR 23(b)(3) applies, not to commonality. The
25 commonality requirement has been met.

MEMORANDUM DECISION (MOT. #1): 3

1 Subsection three is "typicality". Does the plaintiff's complaint arise from the same
2 conduct on the part of the defendant that other putative class members may have experienced? It
3 does. Are there any unique defenses applicable to the plaintiff which would unduly prolong
4 prosecution of the case from the perspective of putative class members? There does not appear
5 to be. A number of cases have been cited which stand for the proposition that "... challenging
6 the same unlawful conduct that affects both the named plaintiff and the rest of the putative class
7 usually satisfies the typicality requirement, despite disparities in individual factual scenarios."
8 *Cullen v. Whitman Med. Corp.*, 188 F.R.D.226, 230 (E.D. Pa. 1999). The typicality requirement
9 has been met.

10 Subsection four is the adequacy of representation and refers to both the class counsel and
11 the class representative(s). Class counsel are very experienced in class action litigation and
12 defendants have not taken issue with plaintiffs' counsels' ability to provide adequate legal
13 representation. Rather the focus is whether Mr. Barbanti, as class representative, can adequately
14 represent the class.

15 Defendants' assert Mr. Barbanti is an inadequate class representative because: (1) he has
16 a conflict of interest with putative class members because he alleged only limited statutory
17 claims; (2) he does not have a claim under the CPA; (3) he is engaging in "claim splitting"; (4)
18 he lacks standing to request injunctive relief because he knew Zonolite contained asbestos before
19 he began the lawsuit; and (5) he lacks credibility.

20 Plaintiff responds that a class representative is not required to assert every possible claim
21 and some claims are not suitable for a class action resolution. This is particularly true of
22 personal injury claims. In a class action, the concept of "claim splitting" is less of a concern than
23 it would be in an individual action. It can be more efficient to manage some issues in a class
24 action setting, i.e. liability issues, and this will not preclude individual litigation of other claims,
25 i.e. personal injury claims.

MEMORANDUM DECISION (MOT. #1): 4

1 With respect to the "standing" argument, this court is not aware of any Washington
2 jurisdictional authority which would prohibit the court from granting plaintiffs' requested relief
3 of a warning to the public simply because Mr. Barbanti knew Zonolite may have contained
4 asbestos.

5 The issue of Mr. Barbanti's credibility was raised in connection with his personal
6 response to the discovery of Zonolite Attic Insulation in some of his properties and his alleged
7 failure to inspect all of his properties or timely warn his tenants. This fact issue has yet to be
8 adjudicated by the court and, if true, has not precluded the plaintiffs from pressing for the
9 hearing of the Motion for Preliminary Injunction.

10 The adequacy of representation has been met.

11 After finding the initial four requirements of CR 23(a) have been met, the court next turns
12 to the applicability of CR 23(b)(1) or (2) and/or CR 23(b)(3). Plaintiffs' assert as they are
13 primarily requesting injunctive relief, CR 23(b)(2) is appropriate. Defendants' allege that the
14 primary purpose of this litigation is monetary, i.e. to compensate persons who remove Zonolite
15 Attic Insulation.

16 Plaintiffs' complaint indicates it is seeking injunctive relief and other equitable remedies
17 including a notification program, development of safety procedures and remediation techniques.
18 In its Supplemental Submission plaintiffs' characterize as "incidental" requests for damages
19 some class members may make for expenses already incurred to remove Zonolite. It also
20 acknowledges that there may be damage claims if they are successful in obtaining equitable
21 relief.

22 The question is what is the primary purpose of the litigation. This court accepts the
23 plaintiffs' assertion that equitable relief is the primary purpose although monetary damage claims
24 would not be unexpected if plaintiffs prevail. The purpose of class action litigation is to allow
25 individuals, who have common causes of action, to pool their resources and pursue legal relief

MEMORANDUM DECISION (MOT. #1): 5

1 which would otherwise be unavailable due to the cost of litigation and the individual amount of
2 damages involved.

3 It is also a benefit to both plaintiffs and defendants that putative class members litigate
4 the class issues in one proceeding to avoid inconsistent adjudications. Defendants have raised
5 the concern that legal actions involving Zonolite are relatively new and there is no "track record"
6 of court decisions as a reason for finding class certification is premature. That position flies
7 squarely in the face of CR 23(b)(1)(A) which recognizes that in cases affecting substantial
8 numbers of persons, defendants should not be subjected to inconsistent standards of conduct
9 imposed by multiple court decisions.

10 Finally, defendants rightly point out that asbestos is heavily regulated by federal agencies
11 and Zonolite is under review by the EPA. Arguably, the resources of a federal regulatory agency
12 are greater than a state superior court and this court has considered that fact. However, federal
13 regulation does not preclude class litigation or preempt the court's ability to take jurisdiction.

14 Therefore, the plaintiff Motion for Class Certification under CR 26(b)(2) is granted. Ms.
15 Scott, please prepare the appropriate order, secure lead counsels' signatures and/or note the order
16 for presentment.

17 Dated this 28th day of November, 2000.

18
19 
20 KATHLEEN M. O'CONNOR
21 SUPERIOR COURT JUDGE
22
23
24
25

MEMORANDUM DECISION (MOT. #1): 6

EXHIBIT 3

12/21/00 TEL 11:50 FAX 509 747 2323

LUKINS & ANNIS

2000

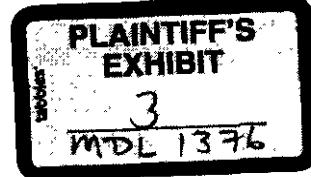
1 SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE DEC 20 2000
2

3 MARCO BARBANTI, ET AL,) Case No.: 00-2-01756-6
 4 Plaintiff,) MEMORANDUM OPINION
 5 vs.) MOTION NO. 2 - PLAINTIFF'S MOTION
 6 W. R. GRACE & CO., ET AL,) FOR PRELIMINARY INJUNCTION AND
 7 Defendant) EMERGENCY NOTICE TO CLASS
 8) MEMBERS
 9)

10 Plaintiff's Motion for Preliminary Injunction and Emergency Notice to Class Members
 11 came before the court for hearing on November 28, 2000. In addition to the pleadings filed in
 12 this matter, the court has considered the testimony of Donald Hurst; videos from Richard
 13 Hatfield and Brendon King; the testimony of Ralph Busch, Don Morgan, Todd Hilsen, William
 14 Huson, M.D., Dr. Richard J. Lee and Dr. Morton Korn and 73 substantive and 19 illustrative
 15 exhibits. The exhibits include affidavits/declarations and/or deposition excerpts from Henry A.
 16 Anderson, M.D., Rand Hatch, Brendon King, Rosemarie Thurman, Ernie Matthews, and Bruce
 17 Hunter.

18 Just prior to commencement of the hearing, counsel received a copy of the court's
 19 Memorandum Decision certifying a class action under CR 23(b)(2). During opening statements
 20 counsel for the plaintiff indicated he would focus primarily on the second part of his original
 21 motion, which was filed on June 1, 2000, the necessity of an emergency notice to class members
 22 under CR 23(d)(2). After both sides concluded their opening statements, but prior to the
 23 testimonial phase of the hearing, I indicated to counsel that it was likely I would require a notice
 24 to class members; however, I would hold plaintiff to the standards of Civil Rule CR 65 in
 25 determining the contents of that notice.

MEMORANDUM DECISION (MOT. #2) - 1



12/21/00 THU 11:50 FAX 509 747 2323

LIXINS & ANNIS

2004

1 STATEMENT OF FACTS

2 Counsel for both sides have devoted pages to a description of the "facts" of this case.
3 Briefly, Zonolite Attic Insulation (ZAI) has been manufactured and distributed by the defendants
4 for many years. This is a vermiculite-based product, which contains asbestos. The amount of
5 asbestos is vigorously contested. The product was marketed as a do-it-yourself insulation
6 product for homeowners that was easy to install. The defendants discontinued sale of the
7 product in the 1980s; however, it continues to function as insulation in many homes in the State
8 of Washington. Prior to commencement of litigation in Washington and several other State
9 Courts and Federal District Courts, in 2000, this product had not been the subject of litigation in
10 an asbestos property damage case.

11 The plaintiff alleges that ZAI is harmful if disturbed and asbestos fibers become airborne.
12 Due to the age of the product and its use in home construction, it is suggested that many
13 homeowners will be remodeling older homes that are insulated with this product. The airborne
14 fibers, which can result from construction, will be a health hazard to the occupiers of the building
15 as well as any contractors/employees who may work on a project. The plaintiff argues it is
16 appropriate to advise the public of this risk.

17

18 DISCUSSION

19

20 As noted above, I have already indicated a notice to potential class members of the
21 existence of this litigation is appropriate even though not required when a class is certified under
22 Civil Rule CR 23(b)(2). The question is what should the notice contain?

23 In order to require the notice contain language that there is a statewide hazard, the
24 plaintiff must show.

25 (1) that he or she has a clear legal or equitable right, (2) that
he or she has a well-grounded fear of immediate invasion of

MEMORANDUM DECISION (MOT. #2) - 2

1 that right, and (3) that the acts complained of are either
 2 resulting in or will result in actual and substantial injury to
 him or her.

3 King v. Riveland, 125 Wn.2d 500, 515, 886 P.2d 160, 169 (1994)

4

5 Has the plaintiff demonstrated there is a statewide hazard, such that court should issue an
 6 emergency notice warning citizens of actual and substantial injury that could occur, before a trial
 7 on the merits has been conducted? At this time I do not believe the plaintiff has demonstrated an
 8 "emergency" which would justify the court sanctioning a notice, and in effect, prejudge the case.
 9 There are factual disputes about the quantity of asbestos in vermiculite; whether or not there is
 10 any threshold level of exposure, which would not be dangerous; the quantity of asbestos fibers
 11 found in the air of the homes tested and the testing protocols used. These are just the type of
 12 disputes meant to be resolved by a trial, not a two-day hearing. Therefore, the notice cannot
 13 imply that the court has ruled on the merits of the plaintiff's claims.

14 However, I am also mindful of the ability of the notice to provide information to citizens
 15 about governmental efforts to address issues raised in this litigation. As long as the notice is
 16 neutral, references to other sources of information about this product may be included as well.

17 Therefore, the notice to class members should include the following:

- 18 • Identify the subject-matter of the litigation
- 19 • Identify the court, participants in the litigation and lead counsel
- 20 • Identify the criteria for members of the class
- 21 • Identify the implications to the class of certification under CR23(b)(2)
- 22 • Identify how potential class members should contact plaintiffs' counsel
- 23 • Identify how potential class members can find out information about the
 litigation, i.e. website, newsletter, correspondence etc.
- 24 • Identify how potential class members can access other information about the
 issues in this case, i.e. EPA website, State of Washington Department of
 Health websites, etc.

25 There are two suggested notices as exhibits in this case. Neither one is neutral and would
 not be acceptable to the court. Each party may submit a suggested notice form to the court.

MEMORANDUM DECISION (MOT. #2) - 3

12/21/00 THU 11:51 FAX 508 747 2323

LUKINS & ANNIS

2006

1 Briefly, the issue of primary jurisdiction has been argued in this case. At this time I do
2 not believe my ruling with respect to the request for preliminary injunction and emergency notice
3 requires that I address the issue. Whether that remains my position depends upon the course of
4 the litigation.

5 Mr. Scott, please prepare the appropriate order. I have set this matter for presentment on
6 January 19, 2001. A separate hearing should be set to approve the notice form. Please consult
7 my judicial assistant with respect to that hearing.

Dated this 19th day of December, 2000.

KATHLEEN M. O'CONNOR
SUPERIOR COURT JUDGE

Kathleen M. O'Connor
Superior Court Judge

MEMORANDUM DECISION (MOT. #2) - 4

EXHIBIT 4

1 2 3 4 5 6

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

8 MARCO BARBANTI, individually and on
9 behalf of a class of all others similarly situated,

NO. 00-2-01756-6

10 Plaintiff,

CLASS ACTION

II

V.

12 W.R. GRACE & COMPANY-CONN (a
13 Connecticut corporation); W.R. GRACE &
14 COMPANY (a Delaware corporation); W.R.
15 GRACE & CO., a/k/a GRACE, an association of
16 business entities; SEALED AIR
CORPORATION (a Delaware corporation); and
WILLIAM V. CULVER, resident of the State of
Washington.

**ORDER DENYING PLAINTIFF'S
MOTION FOR PRELIMINARY
INJUNCTION AND EMERGENCY
NOTICE TO CLASS MEMBERS**

Motion No. 2

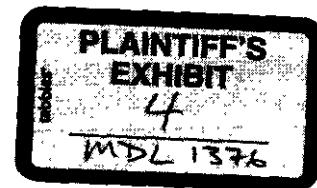
17 Defendants.

1. BASIS

20 THIS MATTER came before the Court for hearing on the 28th day of November, 2000, on
21 Plaintiffs' Motion for Preliminary Injunction and Emergency Notice to Class Members Pursuant to
22 Rule 65(a) or Alternatively 23(d)(2). All parties were represented by counsel.

24 In deciding the Motion, the Court considered the oral argument of counsel, together with
25 the following pleadings: PLAINTIFF'S

ORDER DENYING PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION: 1
(Motion No. 2)



LAW OFFICES
LUKINS & ANNIS
A PROFESSIONAL SERVICE CORPORATION
1401 WASHINGTON TRUST FINANCIAL CENTER
719 W SPRAGUE AVE
SPOKANE, WA 99204-4000
(509) 344-1122

	<i>Pleading</i>	<i>Filed</i>
1.	Plaintiff's Application for Preliminary Injunction and Emergency Notice to Class Members Pursuant to Rule 65(a) or Alternatively 23(d)(2) Memorandum Of Authorities	06/01/00
2.	Memorandum of Points and Authorities in Support of Plaintiff's Application for Preliminary Injunction and Emergency Notice to Class Members Pursuant to Rule 65(a) or Alternatively 23(d)(2)	06/01/00
3.	Affidavit of Henry A. Anderson, M.D. in Support of Plaintiff's Application for Preliminary Injunction and Emergency Notice to Class Members	06/01/00
4.	Affidavit of Ralph Busch in Support of Plaintiff's Application for Preliminary Injunction and Emergency Notice to Class Members	06/01/00
5.	Affidavit of Rand Hatch in Support of Plaintiff's Application for Preliminary Injunction and Emergency Notice to Class Members	06/01/00
6.	Affidavit of Richard Hatfield in Support of Plaintiff's Application for Preliminary Injunction and Emergency Notice to Class Members	06/01/00
7.	Affidavit of Todd B. Hilsee in Support of Plaintiff's Application for Preliminary Injunction and Emergency Notice to Class Members	06/01/00
8.	Affidavit of Donald J. Hurst in Support of Plaintiff's Application for Preliminary Injunction and Emergency Notice to Class Members	06/01/00
9.	Affidavit of Brendan King in Support of Plaintiff's Application for Preliminary Injunction and Emergency Notice to Class Members	06/01/00
10.	Declaration of Darrell W. Scott in Support of Plaintiff's Application for Preliminary Injunction and Emergency Notice to Class Members	06/01/00
11.	Declaration of Kristy L. Bergland in Support of Plaintiff's Application for Preliminary Injunction and Emergency Notice to Class Members	06/01/00
12.	Declaration of Allan McGarvey in Support of Plaintiff's Application for Preliminary Injunction and Emergency Notice to Class Members	06/01/00
13.	Declaration Of Rosemarie Thurman in Support of Plaintiff's Application for Preliminary Injunction and Emergency Notice to Class Members	06/14/00
14.	Declaration Of Ernie Matthews in Support of Plaintiff's Application for Preliminary Injunction and Emergency Notice to Class Members	06/14/00
15.	Grace Defendants' Preliminary Witness List Regarding Plaintiff's Motion For Preliminary Injunction	09/18/00
16.	Grace Defendants' Memorandum In Opposition To Plaintiff's Motion for Preliminary Injunction (Motion No 2)	10/6/00

ORDER DENYING PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION: 2
(Motion No. 2)

LAW OFFICES
LUKINS & ANNIS
A PROFESSIONAL SERVICE CORPORATION
1600 WASHINGTON TRUST FINANCIAL CENTER
217 W SPRAGUE AVE
SPOKANE, WA 99204-4444

1	17.	Declaration Of Rocco Treppiedi Re Defendants' Response To Plaintiff's Motion For Preliminary Injunction (Motion No 2)	10/6/00
2	18.	Sealed Air Corp's Joiner In Grace Defendants' Arguments and Brief Regarding Opposition To Plaintiff's Motion For Preliminary Injunction (Motion No 2)	10/6/00
3	19.	Errata To Declaration Of Rocco Treppiedi Regarding Defendants' Response To Plaintiff's Motion For Preliminary Injunction (Motion No 2)	10/12/00
4	20.	Plaintiff's Reply To Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction and Emergency Notice to Class Members Pursuant to CR 65(a) or Alternatively to CR 23(d)(2) (Motion No 2)	10/20/00
5	21.	Declaration Of Robert Parks In Support Of Plaintiff's Application For Preliminary Injunction And Emergency Notice To Class Members (<i>filed as Exhibit to Plaintiff's Reply to Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction</i>)	10/20/00
6	22.	Supplemental Declaration of Todd B. Hilsee	10/20/00
7	23.	Affidavit of Darrell W. Scott in Support of Plaintiff's Reply To Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction and Emergency Notice to Class Members Pursuant to CR 65(a) or Alternatively to CR 23(d)(2) (Motion No 2)	10/20/00
8	24.	Affidavit Of William E Longo Phd (Motion No 2)	11/17/00
9	25.	Affidavit Of John M Dement (Motion No 2)	11/17/00
10	26.	Affidavit Of John Prebil	11/21/00
11	27.	Affidavit Of Paul Price	11/21/00

The court additionally considered the testimony of Donald Hurst, video from Richard Hatfield, video from Brenden King, testimony of Ralph Busch, testimony of Don Morgan, testimony of Todd Hilsee, testimony of William Hughson, MD, testimony of Dr. Richard Lee and testimony of Dr. Morton Corn and the exhibits referenced in the attached Memorandum Opinion.

ORDER DENYING PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION: 3
(Motion No. 2)

SPOKANE LAW OFFICES CLIENT DOWELL & CO. 1000 WASHINGTON TRUST FINANCIAL CENTER
717 W SPRAGUE AVE
SPOKANE, WA 99204-4444
(509) 343-1333

LAW OFFICES
LUKINS & ANNIS
A PROFESSIONAL SERVICE CORPORATION
1000 WASHINGTON TRUST FINANCIAL CENTER
717 W SPRAGUE AVE
SPOKANE, WA 99204-4444
(509) 343-1333

2. FINDINGS

This Court issued its written Memorandum Decision on this matter on December 20, 2000, and the Court hereby adopts its findings and ruling issued on that date. The Memorandum Opinion is attached to this Order and fully incorporated herein by reference. In particular, the Court expressly finds that factual disputes exist that are meant to be resolved by a trial and the plaintiff has not demonstrated an "emergency" pursuant to CR 65 that would justify the court issuing a notice that would, in effect, prejudge the case or imply that the court has ruled on the merits of the plaintiff's claims. The Court, however, finds that a neutral notice to class members under CR 23(d)(2) is appropriate and that such notice should include the following:

- Identify the subject-matter of the litigation;
- Identify the court, participants in the litigation and lead counsel;
- Identify the criteria for members of the class;
- Identify the implications to the class of certification under CR 23(b)(2);
- Identify how potential class members should contact plaintiffs' counsel;
- Identify how potential class members can find out information about the litigation, i.e. website, newsletter, correspondence, etc.; and
- Identify how potential class members can access other information about the issues in this case, i.e. EPA website, State of Washington Department of Health websites, etc.

A separate hearing should be set to approve the notice form.

3. ORDER

THEREFORE, IT IS HEREBY ORDERED that Plaintiff's Motion for Preliminary Injunction and Emergency Notice to Class Members is denied. A notice to class members is

ORDER DENYING PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION: 4
(Motion No. 2)

AMERICAN INSURANCE COMPANY OF WASHINGTON v. WEAZONOLITE INSULATION LEADINGS, ORDER DENYING PRELIMINARY INJUNCTION DOC 3/29/01

LAW OFFICES
LUKINS & ANNIS
A PROFESSIONAL SERVICE CORPORATION
1400 WASHINGTON TRUST FINANCIAL CENTER
717 W SPRING ST AV
SPOKANE, WA 99204-4666
(509) 456-1122

1 appropriate at this time, however, and each party may submit a suggested notice form that complies
2 with this Court's instructions, for consideration at a separate hearing to be set by the Court.

3 DONE IN OPEN COURT this _____ day of _____, 20001.
4
5
6

7 KATHLEEN M O'CONNOR
8 JUDGE

9 Presented by:
10 LUKINS & ANNIS, P.S.

11
12 By: _____
13 DARRELL W. SCOTT, WSBA# 20241
14 Attorneys for Plaintiff

15
16
17
18
19
20
21
22
23
24
25
26
ORDER DENYING PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION: 5
(Motion No. 2)

USFOKANUVOLOUWCLIENTDWELIBBYWA ZONOLITE INSULATION UPLOADING ORDER PRELIMINARY INJUNCTION DOC 12/17/01

LAW OFFICES
LUKINS & ANNIS
A PROFESSIONAL SERVICE CORPORATION
1000 WASHINGTON TRUST FINANCIAL CENTER
717 W SPRAGUE AVE
SPOKANE WA 99201-3956
(509) 345-9335

EXHIBIT 5